

# Socio-economic rights and women in South Africa: nothing but a handful of feathers?

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## Abstract

The Bill of Rights contained within South Africa's Constitution features a number of 'socio-economic rights'. Although these rights are justiciable they are subject to various limitations. They generally entail a positive onus on the part of the state to provide some good – not immediately, but 'progressively'. Women have a direct interest in the realization of these rights and, where given effect to, they should exert a positive developmental impact. Some authorities are, however, of the opinion that socio-economic rights are not really enforceable. This article contends that the provision of social goods, by the state, should be the concomitant of the disciplined implementation of policy. Delivery should not therefore be contingent upon the legalistic vagaries of the human rights environment.

**Keywords:** Socio-economic rights; justiciability; Bill of Rights; development; South African Constitution; women.

**Disciplines:** Development Studies; Human Rights; Gender Studies; Political Science.

## 1. Introduction

South Africa possesses an extensive array of legislation designed, *inter alia*, to afford certain rights and protections to women and other groups deemed to be disadvantaged, or at least to have been so in the past. As Booysen-Wolthers, Fourie and Botes (2006:605) point out,

*Gender imbalances have been an integral part of South Africa's history, with women being subjected to a variety of patriarchies dating back to the pre-colonial era.*

In recognition of this the African National Congress (ANC) in 1990 declared 'women's freedom from oppression' as being 'a central goal of the national liberation struggle' (Erlank, 2005:195-6).

In keeping with this goal, equality before the law and unfair discrimination are catered for in South Africa in sections 9(1) and 9(3) of the country's Constitution (Act 108 of 1996). As per Albertyn, Goldblatt and Roederer (2001:1), '[s]ection 9 of the [Constitution's] Bill of Rights is a detailed equality right'. Section 7 of the Constitution charges the state with the protection of these detailed rights as spelt out in Chapter Two's Bill of Rights. Section 35 guarantees a fair trial for everyone, section 39 deals with values such as equality and human dignity, and so forth. Discrimination and equality are also focused on in the Promotion of Equality and Prevention of Unfair Discrimination (PEPUDA) Act No. 4 of 2000. This is by way of giving effect to Section 9 of the Constitution. The Employment Equity Act (EEA) No. 55 of 1998 deals with harassment (more especially sexual harassment in the workplace), as does PEPUDA to some extent.

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Against this backdrop of a heightened concern with womens' status and well-being, this article examines the degree to which the socio-economic rights contained within the Bill of Rights might impact on the lives of women. Why these rights should be of particular salience for this constituency is spelt out by Seager (2003:86):

*The majority of the world's population is poor. Women are the majority of the world's poor. The poorest of the poor are women. More so than men, women lack the resources either to stave off poverty in the first place, or to climb out of poverty – they have limited ownership of income, property and credit. Women not only bear the brunt of poverty, they bear the brunt of 'managing' poverty: as providers and caretakers of their families, it is women's labour and women's personal austerity that typically compensate for diminished resources of the family or household.*

According to the South African Human Rights Commission (SAHRC),

*'The constitutional provisions pertaining to socio-economic rights require the State to "take reasonable legislative and other measures within its available resources, to achieve the progressive realization of [these rights]" (SAHRC, 2004a:x).*

Socio-economic rights are regarded as second- or third-generation rights in that they reflect a modern day preoccupation with the problems of poverty and deprivation. They are thus a product of their times and are in a somewhat different category to the classical, Lockean natural rights that went to inform, *inter alia*, the USA's constitution (de Villiers, 1994:601-2).

Only four of the set of eight socio-economic rights, for which the relevant government departments are required by the Constitution to submit 'progress reports' to the SAHRC (Gutto, 2001:244-5), will be discussed here in any detail. These are those rights relating to education; a healthy environment; food; and health care. These are taken as being sufficiently representative of the full set of rights in order to make the article's point. The remaining rights dealing with access to adequate housing, land, water and social security will therefore only be referred to in passing. This article's 'gendered perspective' is not intended to imply that women are *necessarily* any worse off than men when it comes to service delivery although many scholars (see for example Booysen *et al.*, 2006, 2011; Meer, 2007) have persuasively argued that this is indeed the case. Booysen *et al.* (2006, 2011) provide a wealth of statistical detail in support of their contention that South African women's development status deteriorated between 1996 and 2001 and this is corroborated by Seager (2003) who reports that South Africa's ranking on the United Nations Development Programme's (UNDP) Gender-related Development Index (GDI) dropped sharply between 1995 and 2000 (from position 74 to 88).

For the record, it should be noted that there are also a number of additional rights, some of them cross-cutting civil and political human rights, which have socio-economic dimensions. As detailed by Gutto (2001:247-250) these include the rights to self-determination; to equality before the law and protection against unfair discrimination; labour rights; property rights; and the right to legal aid. De Waal, Currie and Erasmus (2001:433) supplement this list with detainees' rights to various social goods.

Gutto (2001:255) is no doubt correct in his assertion that 'justiciability of socio-economic rights *alone* cannot eradicate poverty and glaring inequalities' [own emphasis]. This discussion will, however, after a brief overview of socio-economic rights in general, begin with an assessment of what a selected range of socio-economic rights *could* achieve for women assuming they were given effect to.

The article will then proceed to take an opposite view and sketch a scenario where it will be shown how justiciable socio-economic rights might be used to *subvert* development or any programme for the progressive realization of rights. It is, after all, something of a puzzle why, if a government is genuinely committed to social upliftment, it should see fit to promulgate socio-economic rights, and

then on top of that to make them justiciable. Why not consign the problem to the disciplined implementation of government policy and leave it at that? Why should anything extra be needed? Is one to believe that constitutional provisions will induce a reluctant government to do what it has already decided, for reasons best known to itself, it will not do? These are a few of the questions implicit in the latter half of this paper.

## 2. An overview of socio-economic rights

Rights are usually defined as being 'positive' (the bestower of the right is under an obligation actively to do something) or 'negative' (the bestower should maintain a 'hands-off' attitude and refrain from doing something) (De Waal, Currie and Erasmus, 2001:433-436). Some analysts would downplay this distinction (de Waal et al., 2001:434) but in this writer's opinion it is a critical one and attempts to run the two attributes together must be resisted. This is to forestall a situation whereby the State habitually invades the private sphere of the individual. The 'horizontal' enforcement of rights (where the State imposes upon the individual to act as its agent), as espoused by Motala and Ramaphosa (2002:408-9), arguably paves the way for this to occur.

Human rights discourse is something of a philosophical quagmire. Atkinson (1994) has provided a revealing account of the complex horse-trading surrounding human rights that took place at the 1993 Multi-Party Negotiating Forum. What one must be very clear about is the qualifications with which rights are hedged about, the language in which they are couched, and by virtue of *who or what* they are supposed to be derived or conferred. *Pace* Gutto (2001:250), anybody who thinks they have a positive 'right to health' is labouring under a misapprehension (cf. Fuchs quoted in Cockerham 1989:283). One might just as legitimately claim a 'right to genius'. There never was, nor ever can be, such a right as it cannot be made good by any human agency. A right to health *care*, however, can plausibly be demanded – assuming there is some competent authority structure to demand it *of*. Similarly, a 'right to housing' is not the same thing as a 'right to a house' and neither of these is the same as the South African 'right of access to adequate housing' (McAnearney, 2007:50-52). That the concept 'housing' is very difficult to define with any degree of finality (CSIR, 2000:19) – even 'house' is problematical – only goes to add another layer of difficulty.

In order not to get unduly side-tracked, this discussion will not explore the meanings of words like 'adequate', or quibble about who is best qualified to decide what is 'adequate', other than to note that the interpretation of such terms opens the way for such a plethora of loopholes as might render the right in question purely notional.

South Africa is one of only a handful of countries to have made its socio-economic rights justiciable, or enforceable by a court of law.

*The idea behind a justiciable Bill of Rights is that decisions affecting basic rights and liberties should be reviewed by an institution standing outside the political sphere, namely the judiciary (de Waal et al., 2001:433 & 437n.20).*

Whether this serves any useful purpose other than on occasion to remind the government of its duties is open to question. It need not betoken sincerity. As the *Economist* (2007:12) has editorialized: '... the countries keenest to use the language of social and economic rights tend to be those that show least respect for rights of the traditional sort'. When one reads of South Africa being branded as a 'skunk' and that UNWatch ranked it 'last, alongside China, Russia, Pakistan, Algeria and Saudi Arabia, on a human rights list... [for] shielding Sudan, Zimbabwe, Belarus, Cuba, the Democratic Republic of Congo and Myanmar' against censure (*The Times*, 18 Nov 2007) then one may be forgiven a measure of cynicism about the country's *bona fides* with regard to rights of any stripe – justiciable or not (cf. Butler, 2007).

### 3. Socio-economic rights as affecting women

The questionable utility of socio-economic rights is well captured by Taverne (2005:137) who observes that:

*[W]hat are frequently invoked as rights are really aspirations, like the right to work, the right to health, or the right to freedom from hunger... how can such rights be enforced? What happens if governments ignore them, or find that circumstances prevent these aspirations being realized? A right that, in practice, no one has to respect, is not a right, but an ideal. Meaningful rights are those that can be enforced.*

'Justiciability' is unlikely to make any difference in the face of brute political intransigence or genuine resource scarcity. But assuming a state that bestows these quasi-rights to be in good faith, how might these impact upon women?

#### 3.1 Right to education

Section 29(1) of the Constitution guarantees everyone the right to a basic education (including adult basic education) and to further education which 'the State, through reasonable measures, must make progressively available and accessible'.

It must be made clear that a right to education is not a right to a qualification, no matter how modest, and neither does having paid for a course of instruction *entitle* one to an automatic qualification. Rights generally entail a measure of responsibility on the part of the rights bearer and in this instance the onus is on the bearer to work towards a qualification, using the education provided in terms of the right. The rights bearer is, however, reasonably entitled to insist that the education be at least adequate to acquire a credible qualification. When one encounters matriculated school-leavers who are unable to arrange a list of names in alphabetical order, for example, one is justified in suspecting that such peoples' education has been purely nominal and that, to the degree they genuinely believe themselves to be qualified, they are the victims of an institutionalized fraud. A right, and most especially a right to education, should, at the minimum, equip the rights bearers with the ability to discern whether what they are being offered is sub-standard or not.

That said, education is without doubt the most valuable and the most crucial of the socio-economic rights that women can avail themselves of (Ingle, 2006). Whereas certain of the other socio-economic rights (most especially that of 'social security') may have the effect of reducing women's autonomy, and of reinforcing patterns of dependency, the effect of the right to education should be a liberating one. It should, ironically enough, also free women from any dependency on the rest of the socio-economic rights to be detailed here. Educated people can normally generate options for themselves so that even something like an unhealthy environment, which may be beyond any single person's power to rectify, can be dealt with by the simple expedient of relocating within a country or by emigrating. Educated women ought never to be geographically *stuck* in the way that uneducated women often are (Bauman, 1998:88; UNDP, 2009:2).

Although mention is made in the Constitution of adult and further education, the real emphasis in a developing country should be on Early Childhood Development (ECD) and on a sound primary education (Keeley, 2007; Young & Richardson, 2007; Garcia, Pence & Evans, 2008). If a girl can emerge from such an education being at the very least literate, then she has a fair chance of making something of her life, on her own terms. To deny women an education in today's world is simply unconscionable.

### 3.2 Right to a healthy environment

Section 24 of the Constitution says that everyone has the right to an environment that is not harmful to their health and well-being. 'Environment' here is understood as being the natural environment although it 'has also been given a *relational character*' (SAHRC, 2004b: 5) in that it links to rights such as those to clean water and health care.

In the light of Taverne's comments above, and van Wyk's (1999:51) contention that third-generation (or 'socio-economic') rights 'cannot really be enforced', one must treat the justiciability claimed in the following formulation from Olivier (quoted in Gutto, 2001:246 n.52) with some circumspection:

*Our Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns.*

It should go without saying that, especially for the marooned women referred to in the previous section - those who are without 'escape options' - a disease-free, clean environment adds immeasurably to their quality of life. Poor women often have a particularly intimate and close physical relationship with the natural environment (Ingle, 2006:175) and, on grounds of health alone, one could detail literally hundreds of ways that an unacceptable environment will impinge upon women's well-being. There have been many publications which focus specifically on women's interdependence with the environment (Dankelman & Davidson, 1988; Sontheimer, 1991; Rodda, 1993).

Just one of the ways in which women's health may be compromised by an unsatisfactory environment arises out of the fact that poverty-stricken women frequently have inadequate footwear. In situations where sanitation is primitive, or non-existent, this means that inevitably the soles of their feet come into contact with soil that is contaminated with human faeces. This puts them at very high risk of becoming infested with hookworm.

*The parasite load may run into thousands and causes anaemia, abdominal pain, diarrhoea and increasing lethargy (Ransford, 1983:43-45).*

Part of the problem is that, when an entire community comes to exhibit these symptoms almost all the time, the condition comes to be seen as *normal*. Endemic diarrhoea, in a situation of minimal sanitation, results in precisely those unsanitary conditions the hookworm needs to continue to propagate itself throughout a community. If a whole family is infected, as is not unusual, one can only imagine the consequences for the mother in her caregiver role.

This is just a single example. Contaminated water presents another category with a list of potential disasters all of its own. This is of especial salience in South Africa (Van Riet & Tempelhoff, 2009). It was reported, for example, that in the Emfuleni municipality people still 'have to draw drinking water from the sewage-clogged Vaal River' to the evident indifference of the local authority responsible for the pollution (*IOL*, 2008). This is therefore a most important socio-economic right but, as with any health hazard, it is generally the more literate, educated women who realize just how vital a right it is (World Bank, 2006:100). The fact of the United Nations' WASH campaign - water, sanitation and hygiene for all - provides clear evidence for the importance of hygiene education and training.

Women, insofar as they are fulfilling traditional roles, also tend to suffer disproportionately from the impacts of a degraded environment, as it is they who tend to 'engage very directly with the elements and lack the means to distance or insulate themselves from the effects of desertification or poisoned water' (Ingle, 2006:175).

*When land and water are depleted much more labour – usually women’s labour – is required to maintain the same output. The workload of children also rises for girls more than boys (UNDP, 1995:92-93).*

### 3.3 Right to food

Given their traditional role as caregivers within the family it follows that women have a direct interest in any food-related right (Rodda, 1993). According to Dankelman and Davidson (1988:9), ‘Women produce more than 80 per cent of the food for sub-Saharan Africa’.

The SA Human Rights Commission (2004c:1) states that: ‘The Constitution makes specific reference to food in three sections, namely: section 27(1)(b) where it refers to the State’s obligation to take reasonable legislative and other measures, within its available resources, to achieve progressive realization of everyone’s right to have access to sufficient food and water; section 28(1)(c) where every child has the right to basic nutrition...’ and section 35(2)(e) in respect of detained people.

Interestingly enough, according to the SAHRC (2004c:6), this right ‘is a negative obligation, which requires the State to *refrain from* denying anyone their right of access to food or limiting equal access to the right to food. The equitable allocation of fishing quotas is one practical example of the State’s obligation to respect the right to food’ [emphasis added]. It is not altogether clear that this example is well chosen because someone in possession of a fishing quota is presumably more concerned with a right to a livelihood than a right to food *per se*. Also it is not obvious quite how the right to food is supposed to apply negatively to detainees – one gets rather lost in all the rights jargon. What exactly is ‘limiting equal access to *the right* to food’ supposed to mean? Surely the access is to ‘food’, period, – not ‘the right to food’?

### 3.4 Right to health care

Complaints in the media about South Africa’s public health sector are legion: ‘Limited access to health care... [is] highlighted in a recent Amnesty International report on human rights abuses in South Africa. “One of the issues that bugs us is limited access to health care... government is dragging its feet over anti-retrovirals and we join other organisations in condemning this,” said Amnesty International’s South Africa chairperson in May 2005 (IOL, 2005a). Over two and a half years later an Institute of Security Studies and Transparency International report cited ‘AIDS denialism and *deliberate mismanagement* rather than incapacity to manage resources’ [own emphases] as responsible for the State’s ongoing tardiness in providing anti-retrovirals to AIDS sufferers (Saturday Star, 2007:2).

The right of access to health care services is of major significance for women most especially given their nurturing role as mothers. As the SAHRC (2004d:8) puts it,

*The right to health is a fundamental human right essential for the exercise of other human rights. It is guaranteed by various international and regional human rights instruments. The right of access to health care is enshrined in the Constitution, which makes it obligatory on the State to provide equal and universal access to everyone.*

As already pointed out, the common conflation of a right to health (understood in the ‘positive’ sense), with a right to health care, is problematical and so it is perhaps not surprising that the field of health care provision is a pre-eminent ‘site of contestation’ in the South African socio-economic rights arena. The Constitution chooses its words rather more circumspectly than does the SAHRC. Section 27(1)(a) says, ‘Everyone has the right to have access to health care services, including reproductive health care...’. This latter is of course of pointed salience for women as child-bearers and as evidenced by the hugely liberating impact of the contraceptive pill, in the early 1960s, on the women’s movement (Ingle, 2006).

If education is *the* crucial variable for women's well-being, then access to health care must be next in line. Once again though it is the ostensibly innocuous 'access' that seems designed to insulate the actual good (health care) from the rights bearer should the State find it inconvenient to make good the right. Indeed it is hard to see what real benefit mere 'access' confers. Is a citizen not justified in taking a 'right to have access' so for granted that its value is little more than if one were to be told the State had given one a 'right to breathe'?

Be that as it may, this particular right has resulted in two landmark judgements in both of which the putative rights-bearers got the proverbial 'short end of the stick'. Even though the Treatment Action Campaign (TAC), an advocacy group for people living with HIV, won the right to have anti-retrovirals (ARVs) supplied to HIV-sufferers, the State's implementation of the court's order to supply the medication was so begrudging, and so tardy, as almost to constitute a contempt of court (IOL, 2005b). The second judgement is that of *Soobramony* which is discussed in the following section.

#### **4. The potential for the abuse of justiciability**

In introducing the need for socio-economic rights in South Africa, Gutto (2001:237) claims that, '[P]overty and inequalities are not natural. They have been historically constructed and sustained'. Quite the reverse is true (Landes 1998; Taverne 2005:67). Although no one would deny that poverty and inequality *are* sometimes manufactured and 'sustained', the fact is that poverty and inequality, considered purely as such, are all too 'natural'. And while they may often have been sustained historically, they hardly required any wilful 'construction'. Poverty and inequality are two of the defining conditions of existence in a state of nature and their artificially realised antitheses, prosperity and equality, have to be *striven* towards and *maintained*. Material wealth (capital accumulation) is the *unnatural* state of affairs, 'poverty' in the sense of want or deficiency, is the default, God-given, natural condition from which one may escape by 'the sweat of one's brow' should one so wish. As for inequalities arising out of differences, they are integral to existence on any number of levels - some are born strong, others weak, some with a genetic disposition towards disability, others not (Pinker, 2002). As Ackermann (2006:611) rightly contends, in a nuanced treatment of equality as an *attribute*, 'the real debate should centre around the question "*in what respects* should all humans be treated equally". Without the natural fact of inequality manifesting itself in a myriad differing respects, it would hardly be necessary to frame laws, not to mention socio-economic rights. The notion of equality, and of its being a desideratum, is a thoroughly modern, European idea (Cooper, 1980:4) and is as 'natural' a construct as that other symbol of modernity, the Eiffel Tower.

On the face of it, it almost seems self-evident that justiciable socio-economic rights should advance the cause of women in need of development. But there is a counter-argument which can be made to the effect that these rights could serve as the subtle instrument of women's ongoing oppression.

Prior to the finalization of South Africa's Constitution, the status that socio-economic rights should occupy in the envisaged Bill of Rights was the subject of considerable debate (de Villiers, 1994). For example:

- The South Africa Law Commission maintained that socio-economic rights should not feature at all 'because of their programmatic nature and the positive action that is required of the state in respect of them' (de Villiers, 1994:624).
- Davis warned of the threat to the separation of powers between the judiciary, and the legislative and executive functions of government, and advocated the inclusion of 'a chapter on directive principles' of state policy instead. Davis wanted it to be made explicit that 'second- and third-generation rights [could] only be protected by way of negative constitutional review' (de Villiers, 1994:626).

- De Villiers disputed the classical distinctions between first- and second-generation rights saying that they had become ‘blurred’ (1994:623) and he also claimed that the distinction between ‘negative’ and ‘positive’ state action was outdated (de Villiers, 1994:624). De Villiers also noted the ‘historical support that organizations such as the ANC and PAC [had] given to the recognition of social and economic rights’ (de Villiers, 1994:627).

In the event it was the position argued for by de Villiers that carried the day. Cyril Ramaphosa was one of the chief ANC negotiators at the time of the CODESA discussions when South Africa’s new dispensation was being debated and his views on what exactly is entailed by the justiciability of constitutionally guaranteed socio-economic rights are illuminating (Motala & Ramaphosa, 2002).

Firstly it is made clear that justiciable socio-economic rights (‘social welfare rights’) are part of a wider socialist redistribution programme. Secondly these are to be thought of as ‘group rights’ (Motala & Ramaphosa, 2002:390) that will almost invariably trump individual ‘first generation’ rights where there is a clash (cf. van Schalkwyk, 2007:6-7) – ‘Individuals can be *required* to make sacrifices for the common good’ [own emphasis] (Motala & Ramaphosa, 2002:409).

Thirdly, the granting of these rights is clearly (if unintentionally) presented as being part of a political programme of clientelism.

*If the government fails to [implement the rights], it will suffer the political consequences [ie. loss of power] for failing to fulfil these obligations (Motala & Ramaphosa, 2002:413).*

If these are in fact the sentiments that informed the formulation of justiciable socio-economic rights then they are potentially rather disturbing as they imply a State doing ‘the right thing for the wrong reason’.

While human rights classically have been considered to be absolute, universal, intrinsic and inalienable i.e. grounded in the fact of the bearer’s *humanity* (de Villiers, 1994:601n.5), and *not* held at the pleasure or whim of the State, the foregoing rather suggests that they have now become relative, particularistic, instrumental, and contingent upon the continued beneficence of a political faction whose commitment to rights is somewhat suspect - notwithstanding its high-flown rhetoric. Human rights in South Africa stand in danger of being subtly devalued to the point where they serve as a means with which votes are bought.

The marginalization of the individual in this suspect rights environment is well illustrated in the celebrated case of *Soobramony vs Minister of Health (KwaZulu-Natal)* (Motala & Ramaphosa 2002:404-8) where the state was relieved of the responsibility to supply Soobramony with emergency dialysis treatment on the grounds of the limitation that says that the right to health care is ‘dependent upon the resources available for such purposes’ and that, in Soobramony’s case, the state could not afford to treat the plaintiff.

If one reads the notes of one of the presiding judges in this case (Motala & Ramaphosa 2002:404-8) one could be forgiven for thinking the odds stacked against individuals securing their socio-economic rights in South Africa’s courts. Surely the truth was *not* that the state could *not* afford to treat Soobramony – it was that it *chose* not to afford to. That Addington Hospital just so happened to be under-resourced was irrelevant. If one is going to be serious about socio-economic rights then the onus clearly lies on the state to ensure that hospitals *are* adequately equipped to make good the state’s promises.

The presiding judges might plausibly have said to the State, ‘You will afford what you are directed to afford. If you maintain you cannot afford to treat the plaintiff then readjust your spending priorities to the point where you can.’ Instead what emerged was a capitulation in favour of the State. It strains



credulity that the Department of Health could not have foregone all manner of frivolous discretionary expenditure so as to make good Mr Soobramony's constitutional right.

Judge Chaskalson apparently noted that, were the state to treat Soobramony, it would have to treat all the other cases of chronic renal failure who could not afford private tariffs – in other words this would set a precedent (Motala & Ramaphosa, 2002:406). But if one is going to institute justiciable rights to health care then precedents are presumably what one must commit oneself to. The fact is that the right is supposed to be *progressively realized* so the State should not be allowed to maintain that because it cannot treat *everyone* it is going to treat *no one*. Progressive realization starts with a first step, a single individual, and Mr Soobramony would have served as an ideal starting point. As Liebenberg & Goldblatt (2007:353) remark,

*A central requirement of a reasonable government programme is that it must cater for those whose needs are urgent and who are living in "intolerable conditions".*

The dynamic typified by Chaskalson's reasoning seems to be one of shifting the goalposts whenever the making good of a socio-economic right gets too close for comfort. If an individual sufferer from chronic renal failure appeals to her right, she is put off with the argument that satisfying it would entail treating *all* chronic renal failure sufferers. If *all* the chronic renal sufferers were to bring a class action the response, consistent with Chaskalson's reasoning, would be, 'but what about all the patients whose renal problems are not chronic – must we treat you at their expense?'. Similarly, if a class action were brought by all patients with renal problems, chronic and not, the state's next move might be to object, 'But what about all those with diabetes, tuberculosis, HIV, and so on? Treating you would entail a degraded service for them.'

Pushed to its limit this progression would result in the absurdity of *all the ill* bringing a class action against the state which could then cast around in search of an even more expanded group's welfare to appeal to ('the national interest' for example) by way of renegeing on its commitments. This is a charade that challenges to the State can never win however. The limitations on the rights allow the State to quash any claim brought against it. The *Economist* (2007:12) would seem to be justified in observing that:

*... few rights are truly universal, and letting them multiply weakens them. Food, jobs and housing are certainly necessities. But no useful purpose is served by calling them "rights"... the most reliable method yet invented to ensure that governments provide people with social and economic necessities is called politics.*

## 5. Conclusion: Rights as 'birds in the bush'

It could be inferred, from the above arguments, that citizens have been duped into foregoing the provision of social goods in exchange for the specious right to *access* such goods *if* the state rearranges its priorities, and conducts its financial affairs so as to consider itself in a position to afford the goods in question. Is it the case that, in South Africa, *justiciable* socio-economic rights, far from conferring any value-added benefits, function as a sort of constitutional sop? That, if the justiciable element is resorted to, justiciability in practice affords the state an escape hatch as soon as 'push comes to shove', and it has to make good on its promises of socio-economic delivery?

The odds seem to be so stacked against the individual's finding relief in the courts (cf. Gleason, 2007:2) that the rights environment in South Africa is in danger of being rendered nugatory. Argument about access to the 'right to access rights' is not an illogical outcome in such a Kafka-esque environment whose hallmark is 'the dissipation of huge energy by the disempowered in... litigation for no gain' (Davis, 2006:326).

Insofar as this state of affairs affects women, might it be that their socio-economic 'rights' function as no more than cosmetic window-dressing? If expedient, the possibility is stark that the state will take the easy way out and renege on its 'aspirations' (where the Bill of Rights is still naively being conceived of as an 'aspirational document'). South Africans run the risk of compromising their genuine rights for a clutch of empty socio-economic promises. This may seem a harsh judgement, but South Africa's perverse human rights record at the United Nations (Castaneda, 2008; Fritz, 2010), and the ARV debacle referred to above, arguably speaks louder than anything on the statute books.

Women, considered as a group, as an *abstraction*, might think themselves protected within the South African rights environment, until flesh-and-blood *individual* women put it to the test. Then they may find that their rights as individuals evaporate in the presence of the amorphous requirements of 'the masses of women', or, 'the community', as determined by some dissembling bureaucrat, if not by the courts themselves. They may even find that their individual interests have to be 'sacrificed' (as per Motala & Ramaphosa, 2002:409) for the 'common good'. As Butler (2007) has acutely observed:

*The conflation of rights with socio-economic aspirations... leaves political rights dangerously vulnerable. Politicians can always construe the suppression of civil and political liberties as a necessary consequence of the government's supposed efforts to realize developmental and social rights... if every claim on the state continues to be advertised as a human right in principle, it may soon be that nothing is respected as a human right in practice.*

But perhaps the more immediate question is whether the socio-economic rights environment in South Africa effectively functions as an insubstantial counterfeit for tangible deliverables. Has that which should be the preserve of disciplined policy implementation, been superseded by a collection of empty promises and nebulous 'rights'? In that case it is little wonder that protests triggered by poor service delivery are once again on the rise in South Africa.

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